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No. 98-462

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANCIS H. WOODWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's mail and wire fraud convictions.

2. Whether the district court properly instructed the jury on the intent required for conviction on the fraud charges.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	10
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Badders v. *United States*, 240 U.S. 391 (1916)	16
Chapman v. *United States*, 500 U.S. 453 (1991)	17
Kann v. *United States*, 323 U.S. 88 (1944)	14, 15
McNally v. *United States*, 483 U.S. 350 (1987)	4
Parker v. *Levy*, 417 U.S. 733 (1974)	17
Parr v. *United States*, 363 U.S. 370 (1960)	14, 15, 16
Schmuck v. *United States*, 489 U.S. 705 (1989)	14-15
United States v. *Evans*, 148 F.3d 477 (5th Cir. 1988), petition for cert. pending, No. 98-7223	15
United States v. *Maze*, 414 U.S. 395 (1974)	14, 15
United States v. *Mazurie*, 419 U.S. 544 (1975)	17
United States v. *McNeive*, 536 F.2d 1245 (8th Cir. 1976)	12, 13
United States v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979)	12, 13
United States v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996)	6, 9, 13, 16

Statutes:

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508	5
18 U.S.C. 371	2, 4
18 U.S.C. 1341	1, 4, 10
18 U.S.C. 1343	1, 4, 8, 10
18 U.S.C. 1346	4, 5, 10, 11, 17
18 U.S.C. 1952	1, 4

Statutes—Continued: Page

Mass. Gen. Laws Ann. ch. 268B, § 5 (West 1992 & Supp. 1998) 3

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 149 F.3d 46.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1998. The petition for a writ of certiorari was filed on September 17, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341; wire fraud, in violation of 18 U.S.C. 1343; interstate travel to commit bribery, in violation of 18 U.S.C. 1952;

and conspiracy to commit those offenses, in violation of 18 U.S.C. 371. The district court sentenced petitioner to six months' imprisonment, to be followed by two years' supervised release, and imposed a fine of $5000. The court of appeals affirmed. Pet. App. 1a-56a; Gov't C.A. Br. 3.

1. From January 1977 until April 1992, petitioner was a member of the Massachusetts House of Representatives. From January 1985 to January 1991, he served as the House Chair of the state legislature's Joint Committee on Insurance. Together with the Senate Chair, petitioner supervised the staff of the Insurance Committee and scheduled all hearings and meetings. He had the authority to assign bills to the hearing calendar and subsequent executive sessions, and to take other actions that would help advance bills through the committee. Petitioner also had considerable influence over the ultimate disposition of a bill, including the ability both to "carry" a bill through the legislative process by advocating or leading the debate for the bill, and to send a bill to "study," which would effectively shelve it. Pet. App. 2a, 4a & n.1; Gov't C.A. Br. 3-4.

William Sawyer was a lobbyist for the John Hancock Mutual Life Insurance Company (Hancock), one of the two largest life insurance companies in Massachusetts. From 1984 to 1992, petitioner accepted approximately $8700 in gratuities from Sawyer, for which Sawyer was then reimbursed by Hancock. Sawyer's expenditures on behalf of petitioner consisted mainly of payments for meals, golf outings, and other entertainment both at conferences—sponsored by the National Conference of Insurance Legislators (COIL), a national association of state legislators involved in insurance matters—and in Massachusetts. The gratuities offered by Hancock to

petitioner increased when he ascended to the position of House Chair of the Insurance Committee. Those gratuities remained at high levels throughout his chairmanship and through 1991, the year he left his position as co-chair. In 1992, the year petitioner resigned from office, he received a mere $16 in gratuities from Hancock. Pet. App. 2a-3a, 5a-8a; Gov't C.A. Br. 4-8.

During his tenure as House Chair of the Insurance Committee, petitioner met with Sawyer approximately three times a week when the legislature was in session. Petitioner consistently took official actions that promoted the interests of Hancock and the life insurance industry. Insurance Committee research director Robert Smith stated that petitioner was the most pro-life-insurance-industry chair during Smith's ten-year tenure. For example, in 1989 a bill opposed by Hancock would have required mandatory discounts on life insurance for non-smokers. After the bill received a favorable recommendation from the Insurance Committee based on the support of the Senate Chair, petitioner led the opposition to the bill in debate before the full House of Representatives, ultimately defeating the bill. Petitioner also repeatedly led the Insurance Committee to support and report favorably bills proposed by the insurance industry and then pushed those bills through the legislative process. Pet. App. 8a, 25a; Gov't C.A. Br. 8-11.

Massachusetts law required petitioner to file a yearly Statement of Financial Interests (SFI) with the Massachusetts State Ethics Commission. Pet. App. 29a-30a; see Mass. Gen. Laws Ann. ch. 268B, § 5 (West 1992 & Supp. 1998). Petitioner was required to disclose on his SFI forms gifts with an aggregate value greater than $100 that he received from lobbyists or businesses that had a direct interest in legislation. Petitioner did not

disclose any of the gratuities received from Hancock on his SF1 forms for the years 1984 through 1992. Pet. App. 30a; Gov't C.A. Br. 12-15.

After petitioner left the legislature, he asked Sawyer to help him obtain employment as a lobbyist with Hancock. Sawyer, however, told petitioner that he lacked the necessary experience for the job. In a conversation with Smith, petitioner expressed disappointment at Sawyer's unwillingness to help him. Smith stated that petitioner told him: "After all I did for Bill Sawyer, you know, I can't believe he's not—he can't get me a job." Petitioner complained to Smith that "you would think after all the years and everything I've done I would be treated better than I have been treated." Petitioner also reported to Smith that he had told Sawyer that "[i]f he [petitioner] could not get the job himself he'd like to see his son Brian get the job." Pet. App. 21a-24a; Gov't C.A. Br. 11-12.

2. A federal grand jury returned a 28-count indictment charging petitioner with conspiracy, in violation of 18 U.S.C. 371; multiple counts of mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, 1346; and multiple counts of interstate travel to commit bribery, in violation of 18 U.S.C. 1952. Pet. App. 59a-77a. The mail and wire fraud counts alleged a scheme to defraud the Commonwealth of Massachusetts and its citizens of their right to petitioner's honest services as a state legislator.[1] The indictment charged that in furtherance

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[1] The mail and wire fraud statutes, 18 U.S.C. 1341, 1343, proscribe mailings and wire transmissions in furtherance of "any scheme or artifice to defraud." In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that Section 1341 was "limited in scope to the protection of property rights" and did not criminalize schemes "designed to deprive individuals, the people, or the government of intangible rights." *Id.* at 358, 360. The following year,

of this scheme, petitioner accepted illegal gratuities from individuals representing Hancock and the insurance industry trade association, that he filed false SFI forms in which he unlawfully failed to report his receipt of those gratuities, and that he repeatedly performed official acts on behalf of Hancock and the trade association. Pet. App. 10a, 64a-72a.

At trial, the district court instructed the jury that in order to convict petitioner on the fraud counts, the government was required to prove beyond a reasonable doubt that petitioner acted with intent to defraud. 10/1/96 Tr. 98-99; Gov't C.A. Br. 40. The court instructed that such intent "means to act knowingly and with a specific intent to deceive for the purpose either of causing a loss to another or bringing about gain to one's self or for both of those purposes." 10/1/96 Tr. 98-99; Gov't C.A. Br. 40-41. Further, the court stated that to prove intent to defraud the government was required to show petitioner's "lack of good faith * * * beyond a reasonable doubt." 10/1/96 Tr. 109-110; Gov't C.A. Br. 41. The district court warned the jurors that "unattractive or reprehensible" behavior in the relationship between legislators and lobbyists does not constitute a violation of federal law. 10/1/96 Tr. 95. "The focus here is on the intent of the defendant to accept a gratuity, actually to influence his official duties, to cause him to depart from his duty to act as a disinterested legislator or legislative decision-maker."

Congress enacted 18 U.S.C. 1346, which provides that, for purposes of the mail fraud and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508.

Id. at 101. The court also gave the following instruction:

> You may not find that the defendant violated either set of the federal laws, which I have described to you, if his receipt of the expenditures was solely part of a routine cultivation of a business or political friendship rather than an intent on his part to be influenced in his official legislative duties. If, instead or in addition, there is an intent on the defendant's part to be influenced in his official legislative duties, then you may find a violation of either set of federal laws. If there is both the intent to cultivate a business and political friendship and the intent to be influenced in official legislative duties, then you may find a violation of the federal laws.[2]

Id. at 128; Gov't C.A. Br. 41. The court then reminded the jurors that "you're not to be concerned with whether or not it is unattractive for lobbyists and legislators to have a close personal friendship," and cautioned them that "[p]ayments for entertainment, lodging, golf, sports events and the like cannot serve as the basis for the federal violations if the aim is limited to

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[2] That instruction was derived from the court of appeals' decision in *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996), in which William Sawyer—the same Hancock lobbyist—had appealed his convictions for mail and wire fraud, as well as interstate travel to commit bribery. The court of appeals reversed Sawyer's convictions based in part on the district court's failure to instruct the jury that a lobbyist who provides gratuities to a public official "has not violated the bribery component of the Travel Act (or committed honest services fraud) if his intent was limited to the cultivation of business or political friendship." *Id.* at 741. The court explained that "[o]nly if instead or in addition, there is an intent to cause the recipient to alter her official acts may the jury find" a violation of those federal statutes. *Ibid.*

the cultivation of a business or political friendship." 10/1/96 Tr. 128-129; Gov't C.A. Br. 41-42.

The jury found petitioner guilty on the conspiracy count (Count 1), one mail fraud count (Count 4), one wire fraud count (Count 9), and two Travel Act counts (Counts 14 and 24),[3] and acquitted petitioner on all remaining counts. Pet. App. 9a & n.4.

3. The court of appeals affirmed. Pet. App. 1a-56a. Petitioner challenged the sufficiency of the evidence to sustain his fraud convictions, claiming that the evidence was insufficient to prove that he accepted the gratuities with the intent to deprive the public of his honest services. *Id.* at 15a. The court of appeals rejected that claim, finding that evidence concerning the circumstances of petitioner's relationship with Sawyer supported the jury's finding that petitioner "knew what the deal was—that the gratuities would continue as long as he voted favorably to Hancock's interests—and that he intended to be influenced by the gratuities." *Id.* at 19a (citation omitted). The court noted one instance in which Sawyer departed from a conference early but left his credit card behind to pay for petitioner's golf and meal expenses during the remainder of the conference. The court found that that arrangement was "not consistent with mere friendship as the sole purpose of the payments, but rather is more consistent with the theory of a gratuity made because of [petitioner's] potential official actions." *Ibid.* The court of appeals further noted that "[t]he same inference can be drawn from the fact that the expenditures were not mutual but rather operated in one direction only." *Id.*

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[3] The district court granted a post-trial motion for judgment of acquittal on Count 24, ruling that it was multiplicitous with Count 9. Pet. App. 9a n.4; Gov't C.A. Br. 3.

at 20a. The court also remarked that the government presented direct evidence of petitioner's illegal intent, including his statements to Smith concerning his efforts to persuade Sawyer to assist him in obtaining employment with Hancock. *Id.* at 21a-24a. In addition, the court found that the jury's verdict was supported by evidence of the extent to which petitioner's discretionary official actions served the interests of Hancock and the insurance industry. *Id.* at 24a-29a.

Petitioner also argued that the evidence was insufficient to support his wire fraud conviction because the telephone call that formed the basis of that conviction was not made "for the purpose of executing" the fraudulent scheme. Pet. App. 32a; see 18 U.S.C. 1343. The telephone call charged in the indictment was placed by a Hancock employee to a hotel in Orlando, Florida, to reserve a hotel room so that Sawyer could attend a COIL conference in that city. Pet. App. 33a. The court of appeals held that "[t]he jury could reasonably have concluded that the call was made in furtherance of the scheme to defraud." *Id.* at 34a. The court reasoned that in order to provide petitioner with illegal gratuities at the COIL conference, Sawyer needed to secure a hotel room in which to stay during the conference. Because "[t]he call in question secured that room," the court stated, it "played an essential role in the scheme." *Ibid.*

Likewise, the court rejected petitioner's argument that the government had failed to prove that the mailing alleged in the mail fraud count was made in furtherance of the scheme to defraud. Pet. App. 35a-37a. The use of the mails on which petitioner's conviction was predicated was Citibank Visa's mailing of a bill to Sawyer for charges arising from his use of his Visa card to pay for gratuities given to petitioner. *Id.* at 35a-36a.

Petitioner claimed that because the mailing took place several weeks after Sawyer purchased those meals and entertainment for petitioner, the fraudulent scheme "had already reached fruition by the time the mails were used." *Ibid.* The court of appeals disagreed, noting that petitioner mistakenly "assume[d] a new fraudulent scheme began and ended every time Sawyer used his credit card to pick up the tab" for petitioner. *Id.* at 36a. On the contrary, the court stated, "the evidence supported the conclusion that the fraudulent scheme in which [petitioner] and Sawyer participated was an ongoing scheme, lasting for years and involving Sawyer's use of his credit card." *Ibid.* The court concluded that it was "a necessary part of the ongoing scheme that Sawyer pay his bill after receiving it in the mail." *Ibid.*

Petitioner also argued that the district court erred in instructing the jury that it could find him guilty on the fraud charges if it found that, in accepting the gratuities from Sawyer, he intended both to cultivate his friendship with the lobbyist and to be influenced in his official duties. Pet. App. 46a-48a. The court of appeals held that the district court's instruction accorded with its prior decision in *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996) (Pet. App. 48a-51a), rejecting petitioner's suggestion that *Sawyer* held that "the formation of a friendship between a lobbyist and a legislator somehow insulates both from prosecution for honest services fraud." *Id.* at 48a. Instead, the court explained, "[a] defendant may be prosecuted for deprivation of honest services if * * * he is found to have intended both a lawful and an unlawful purpose to some degree." *Id.* at 50a.

The court also rejected petitioner's contention that the district court should have instructed the jury that it

could not convict him if it found that his illegal intent was "*de minimus* [*sic*] or insignificant," reasoning that "[t]he criminal law may punish conduct even if its illegal purpose is incidental to other, legal purposes." Pet. App. 52a. In any event, the court found "no evidentiary basis" for petitioner's "implicit contention that he had no more than a *de minimus* degree of intent to defraud the public of his honest services." *Id.* at 53a. Thus, the court held, any error in the district court's "omission of explicit '*de minimus*' language from the jury instructions" was harmless. *Ibid.*

ARGUMENT

1. Petitioner raises two challenges (Pet. 7-16, 21-25) to the sufficiency of the evidence to support his mail and wire fraud convictions. Neither claim warrants this Court's review.

a. First, petitioner argues (Pet. 7-16) that the evidence was insufficient because the government failed to prove a "direct link" (Pet. 10) between any particular gratuity provided by Sawyer and a specific official action that petitioner would not have taken "but for his receipt of the gratuity." *Ibid.* Petitioner contends that, to obtain a conviction for deprivation of honest services under the mail and wire fraud statutes, 18 U.S.C. 1341, 1343, 1346, the government must present evidence satisfying such a "quid pro quo requirement." Pet. 14.[4]

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[4] The issue in this case is distinct from the question presented in *United States* v. *Sun Diamond Growers*, cert. granted, No. 98-131 (Nov. 2, 1998). In that case, the Court granted certiorari to consider whether "the requirement in 18 U.S.C. 201(c)(1)(A) that a thing of value be given 'for or because of any official act' [is] satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position." Neither the mail fraud nor the wire fraud statute, 18 U.S.C. 1341, 1343, contains similar

Petitioner does not cite—and we have not found—any decision in conflict with the court of appeals' decision below. Petitioner relies (Pet. 10-11) on cases in which public officials were convicted of mail or wire fraud based on evidence of specific actions taken by the defendants in exchange for bribes. Yet he cites no decision holding that Section 1346 requires such evidence of a "direct link * * * between a particular gratuity and resulting favorable action * * * [that] would not have been taken by the official but for his receipt of the gratuity." Pet. 10.

In any event, there is no basis for petitioner's claim (Pet. 16) that his conviction was based merely upon evidence of his "performance of official acts which by happenstance were favorable to Hancock but which were influenced by [his] view of the merits and not his receipt of the gratuities." As the court of appeals correctly held, the jury could infer that petitioner knew that the gratuities from Sawyer "would continue as long as he voted favorably to Hancock's interests," and that petitioner "intended to be influenced by the gratuities" (Pet. App. 19a), as demonstrated by the evidence that he "repeatedly acted on behalf of Hancock and the life insurance industry in his capacity as co-chair" of the Insurance Committee. *Id.* at 8a. The court of appeals also relied on several other aspects of the record at trial in holding that sufficient evidence supported the jury's verdict, including Sawyer's leaving his credit card behind at a conference to cover petitioner's meals and golf expenses, the fact that Sawyer covered petitioner's

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language. Indeed, 18 U.S.C. 1346 broadly defines a "scheme or artifice to defraud" for purposes of the mail and wire fraud statutes to include a "scheme or artifice to deprive another of the intangible right of honest services."

expenses but not vice versa, and the direct evidence of petitioner's statements to Smith concerning his efforts to persuade Sawyer to help him (or failing that, his son) to obtain a position with Hancock as a lobbyist.[5] *Id.* at 19a-24a. In short, as the court of appeals concluded (*id.* at 28a), the evidence was sufficient to permit the jury to infer a "connection between the gratuities and [petitioner's] official acts."

Petitioner disputes (Pet. 12-13) the court of appeals' further finding that his failure to disclose the gratuities received from Sawyer on his SFI forms, as required by state law, supported the jury's inference that petitioner intended to deprive the public of his honest services. Pet. App. 29a-32a. Petitioner claims that in that respect the court's decision is in conflict with the Eighth Circuit's rulings in *United States* v. *Rabbitt*, 583 F.2d 1014 (1978), cert. denied, 439 U.S. 1116 (1979), and *United States* v. *McNeive*, 536 F.2d 1245 (1976). Neither decision supports his claim.

In *Rabbitt*, the defendant was a state legislator who, in return for a fee, aided an architectural firm in obtaining state contracts. 583 F.2d at 1020. The defendant, however, "did not, in his official capacity, control the awarding of state contracts to architects," and the evidence did not demonstrate that he failed to carry out any of his official legislative duties or that he had an affirmative duty to disclose his interest. *Id.* at 1026. The court in *Rabbitt* acknowledged that "[t]he concept of fraud upon the public may clearly fall within the ambit of the mail fraud statute where dishonest conduct by a public official directly implicates the functions and

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[5] This evidence belies petitioner's claim (Pet. 14) that the court of appeals allowed the government to convict him based solely on a "scorecard" of his votes on various legislative proposals.

duties of *that official's* public office." *Id.* at 1024 (emphasis added). Similarly, in *McNeive*, a plumbing inspector's acceptance of gratuities for the performance of his duties was held not to violate the mail fraud statute because the defendant "exercise[d] no discretion in the issuance of plumbing permits," and he "was not derelict in any of his affirmative duties as Chief Plumbing Inspector." 536 F.2d at 1246, 1252. The court also relied on the absence of any attempt by the defendant to conceal his conduct as "tend[ing] to negate a finding that [he] entertained the requisite intent to defraud." *Id.* at 1252.

Here, by contrast, petitioner did exercise significant discretionary control over the legislative agenda for bills important to the life insurance industry. Accordingly, the court of appeals properly held that "[w]hen an official fails to disclose a personal interest *in a matter over which she has decision-making power*, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act." Pet. App. 29a-30a (emphasis added) (quoting *Sawyer*, 85 F.3d at 724). Moreover, petitioner had a duty under state law to disclose the gratuities he received from Sawyer. His failure to do so, in accordance with *McNeive*, could support a finding of petitioner's intent to defraud. In short, petitioner's conviction would also have been affirmed under the rule of the Eighth Circuit.[6]

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[6] There is no basis for petitioner's contention (Pet. 13) that the court of appeals improperly "collapse[d]" two elements of his fraud offenses, the intent to deprive the public of his honest services and the intent to deceive required to make out a "scheme to defraud." As petitioner acknowledges, the court of appeals specifically stated (Pet. App. 12a n.6) that the two elements are distinct and must

b. Petitioner also renews his contention (Pet. 21-25) that the government failed to prove that the telephone call and mailing on which his fraud convictions were based furthered the execution of the fraud. That claim is limited to the particular facts of this case and was properly considered and rejected by the court of appeals.

Petitioner suggests (Pet. 23-24) that the fraudulent scheme could have been carried out in other ways that did not involve the charged telephone call or mailing. This Court has made clear, however, that the use of the mails or wires on which a mail fraud or wire fraud conviction is based "need not be an essential element of the scheme" to defraud; rather, "[i]t is sufficient for the mailing to be incident to an essential part of the scheme, or a step in [the] plot." *Schmuck* v. *United States*, 489 U.S. 705, 710-711 (1989) (citation and internal quotation marks omitted).

Petitioner also contends (Pet. 24) that the court of appeals' ruling conflicts with this Court's holdings in *Kann* v. *United States*, 323 U.S. 88 (1944); *Parr* v. *United States*, 363 U.S. 370 (1960); and *United States* v. *Maze*, 414 U.S. 395 (1974), because the charged mailing occurred only after petitioner received the gratuities from Sawyer. In *Kann*, *Parr*, and *Maze*, however, the fraudulent scheme had already "reached fruition" before the charged mailings took place, so that the mailings "involved little more than post-fraud accounting among the potential victims of the various schemes." *Schmuck*, 489 U.S. at 713, 714; see *id.* at 712-714

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each be satisfied in order to sustain a fraud conviction based on deprivation of honest services. Rather than "collapsing" the two elements, the court merely held that the same evidence supported the jury's findings with respect to both elements. See *id.* at 31a.

(distinguishing *Kann*, *Parr*, and *Maze*). In this case, as the court of appeals found (Pet. App. 36a), the mailing of Sawyer's credit card bill advanced an "ongoing scheme" in which Sawyer repeatedly used his credit card to pay for gratuities provided to petitioner. Thus, it is clear that the mailing was a "step in the plot" that furthered the execution of the scheme to defraud.[7]

Petitioner's claim (Pet. 21-22) that the mailing and telephone call were merely "pretexts to invoke federal jurisdiction" over violations of state law is equally unavailing. As this Court has explained, "[t]he fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute, for Congress 'may forbid any . . . [mailings] . . . in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.'"

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[7] For the same reason, petitioner's reliance (Pet. 25 n.17) on *United States* v. *Evans*, 148 F.3d 477 (5th Cir. 1998), petition for cert. pending, No. 98-7223, is likewise misplaced. The defendant in that case was a parole officer in Fort Worth, Texas, who accepted bribes from a parolee she supervised in exchange for concealing his parole violations. *Id.* at 478-479. The defendant submitted false travel vouchers for required visits to the parolee's places of residence and employment that she in fact never made. *Id.* at 479. After the vouchers were approved by her supervisor, they were mailed to Austin, Texas, for processing. *Id.* at 482-483. The defendant was convicted of mail fraud based on the mailing of the travel vouchers. The court of appeals reversed her mail fraud convictions, explaining that "there was nobody in Austin who might have uncovered the scheme because [the defendant] did or did not submit travel vouchers," and, therefore, the scheme reached fruition once the defendant's supervisor approved the vouchers. *Id.* at 483. Because the charged mailings took place after that time, the court held, they did not further the scheme to defraud the State of its right to the defendant's honest services. *Ibid.* Here, in contrast, the credit card mailings took place during an ongoing course of conduct and assisted in perpetrating the scheme.

Parr, 363 U.S. at 389 (quoting *Badders* v. *United States*, 240 U.S. 391, 393 (1916)).

2. Petitioner also contends (Pet. 17-20) that the district court erred in instructing the jury regarding the requisite intent under the mail and wire fraud statutes for honest services fraud. He faults the court's instructions because he claims they permitted him to be convicted without proof of "the necessary quantum of unlawful intent in the mix." Pet. 18.

In *Sawyer*, the First Circuit held that, in honest services fraud cases concerning political corruption, a "jury needs to be told specifically that the defendant has not * * * committed honest services fraud * * * if his intent was limited to the cultivation of business or political friendship." 85 F.3d at 741. In accord with *Sawyer*, the district court instructed the jury that it could not find petitioner guilty "if his receipt of the expenditures was solely part of a routine cultivation of a business or political friendship rather than an intent on his part to be influenced in his official duties." Pet. App. 51a. The court also instructed the jury that it could find petitioner guilty on the fraud charges if there was "*both* the intent to cultivate a business and political relationship *and* the intent to be influenced in official legislative duties." *Ibid.* (emphasis added). As the court of appeals correctly observed, that instruction complied for all relevant purposes with the requirements set forth in *Sawyer*. *Id.* at 50a-51a. In his petition to this Court, petitioner fails to cite any court of appeals decision—in any circuit—that would require a district court to go beyond *Sawyer*'s requirements and give a "*de minimis*" intent instruction in such circumstances. Absent such disagreement among the lower courts, no further review is warranted by this Court.

In any event, the court of appeals' decision is correct. The court found that, "even if the instructions were not technically adequate because they lacked an explicit '*de minimus*' instruction, [petitioner] was not prejudiced thereby." Pet. App. 52a. As explained and recounted above, the evidence presented at trial more than adequately supported the jury's finding that petitioner possessed the intent to defraud. There is thus no basis for petitioner's claim that he accepted gratuities from Sawyer primarily for the lawful purposes of cultivating business and political friendship and only to a *de minimis* extent for the unlawful purpose of allowing his official legislative duties to be influenced thereby.[8]

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[8] Because sufficient evidence existed to support the jury's inference of petitioner's intent to defraud, he also cannot press his due process claim that the mail and wire fraud statutes are void for vagueness. Petitioner may not successfully attack Section 1346 as unconstitutionally vague by showing that hypothetical situations exist in which application of the statute would be ambiguous. He can prevail only by demonstrating that the statute failed to provide clear warning that his own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * * , so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1998